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Supreme Court, U.S.
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No. 86-1153
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FBK REALTY CORP.,

Petitioner,

-against-

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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February 18, 1987.

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EDITOR'S NOTE

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QUESTION PRESENTED

Is section 96-109 of the New York City Zoning Resolution unconstitutional on its face when, to preserve the socio-economic character of the Special Clinton District in the face of rapid gentrification, the section permits building renovations that require an alteration permit only if the tenants in the building have not been harassed?

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STATEMENT OF THE CASE

In October, 1983, petitioner purchased a building at 468 West 47th Street in the borough of Manhattan in New York City located in the Special Clinton District (13a).[1]

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[1]Numbers in parentheses refer to pages of
(Footnote Continued)

The Special Clinton District was established in 1975 by Article IX, Chapter 6 of the New York City Zoning Resolution (37a). Clinton, historically known as Hell's Kitchen, is bounded on the east and west by Eighth and Twelfth Avenues and on the north and south by 59th and 41st Streets (37a).

Section 96-00 of the Zoning Resolution provides, in relevant part, that the Special Clinton District's location -- between the waterfront and Convention Center on the west and a "growing central business district," Times Square, on the east -- requires specific programs and regulations to realize community and City-wide goals. Those goals are preserving and strengthening the residential character of the community and permitting rehabilitation

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(Footnote Continued)
petitioner's Appendix to its Petition for a Writ of Certiorari.

and new construction consistent with the current existing scale of the community and "at rental levels which will not substantially alter the mixture of income groups presently residing in the area." Zon. Res. § 96-00(a),(b) (emphasis added). Section 96-109 of the Zoning Resolution provides (1a):

> Alteration of buildings
>
> Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a building containing residential uses within the Preservation Area, the Administrator of [New York City's Department of Housing Preservation and Development, "HPD"] shall certify to the Department of Buildings:
>
> (a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified [HPD] of his intention to alter the building;
>
> (b) That the eviction and relocation practices followed

> by the owner of the building satisfy all applicable legal requirements and that no harassment has occurred [emphasis in original denotes terms defined in section 12-10 of the Zoning Resolution].

Thus, before New York City's Department of Buildings can issue an alteration permit for a building located within the "Preservation Area" of the Special Clinton District, HPD must certify that harassment was not used to displace established residents from the building. This provision is intended to remove the economic incentive to the harassment of residents of the Clinton neighborhood and thereby preserve the current mixture of income groups (38a). Petitioner's building is in the "Preservation Area."

On or about September 20, 1983, petitioner filed with the New York City Department of Buildings an application seeking a permit that would allow petitioner

to renovate its entire building and create additional apartments. The Department of Buildings did not issue the alteration permit because petitioner did not have certification of no harassment from HPD (39a).

By letter dated December 13, 1983, petitioner sought certification of no harassment from the Clinton Neighborhood Preservation Office, an office of HPD (39a). Petitioner's president, James Hefelfinger, submitted an affidavit in which he stated that petitioner had not harassed any tenant to induce the tenant to vacate her apartment.

The Clinton Neighborhood Preservation Office works to preserve and rehabilitate the housing stock in the Clinton area and seeks to prevent displacement of tenants from buildings that are upgraded. In this case, the Clinton Neighborhood Preservation Office followed its standard procedure for review of

requests for certification of no harassment, conducted an investigation, and referred petitioner's application to the Single Room Occupancy ("SRO") Anti-Harassment Unit of HPD's Office of Rent and Housing Maintenance, Division of Evaluation and Compliance. Based upon the file referred by the Clinton Neighborhood Preservation Office, the SRO Anti-Harassment Unit recommended that the HPD Commissioner issue a finding of reasonable cause to believe that harassment had occurred at petitioner's building (40a).

HPD's Commissioner issued a finding that there was reasonable cause to believe that harassment had occurred, and a copy of that finding was mailed on or about May 25, 1984 to James Hefelfinger as applicant on behalf of petitioner (40a).

By a notice dated July 5, 1984, HPD notified petitioner that a hearing would be

held on July 18, 1984 regarding the request for certification pursuant to Section 96-109 of the Zoning Resolution (40a). HPD's notice further alleged generally that the "fee owner" of 468 West 47th Street had harassed the tenants and also set forth specific conduct which was alleged to be harassment: the failure to maintain and repair, the failure to provide security, heat, and hot water, and inducing tenants to vacate their apartments (41a-42a).

A hearing was conducted on July 18, 1984 by an HPD hearing officer, and both petitioner and HPD were represented by legal counsel who called and cross-examined witnesses and presented documentary evidence (42a-43a). In its Petition for a Writ of Certiorari, petitioner states that it assumes "the factual correctness of HPD's finding that FBK had 'harassed' tenants and committed unlawful eviction practices ...."

(Petition at 10). Therefore, respondent will not repeat the testimony offered at the hearing concerning harassment.

However, concerning its claim that section 96-109 of the Zoning Resolution is a taking of its property, the only proof petitioner offered of the value and supposed diminution in value of its property was its purchase price of approximately $310,000 and its architect's testimony that alteration plans called for new apartments, including a penthouse apartment. In fact, the architect testified that "[t]he major extent of the work is simply putting up new partitions. Structurally it's a very sound building." The plans also included installing new plumbing, heating, and "new finishes." The architect testified that the plumbing was "beyond repair" and that a completely new electrical system had to be installed.

No one testified that incidental repairs, which do not require an alteration permit, could not be made; no one testified that an application to make incidental repairs had been made and denied; and no one testified what the resale value of the building was, before or after the proposed alteration. No one testified that the building could not be sold or that it was economically worthless.

The hearing officer concluded that HPD had proved by a preponderance of the evidence that petitioner's eviction and relocation practices were not lawful and that the building's tenants had been harassed in the past and continued to be harassed (7a-8a). Concerning tenant harassment by petitioner, the present owner, the hearing officer expressly found that the presence of squatters and lack of building security contradicted petitioner's stated intent not to force out the remaining tenants, that the

current conditions disturbed the tenants, that evidence of payment for janitorial services was insufficient to rebut the tenant's testimony of lack of services, and that petitioner was not providing essential services (7a-8a). The hearing officer held that a current owner must be responsible for the harassment of prior owners to avoid the possibility of sham transfers of property (4a-5a). However, the hearing officer did not rule on whether a current owner's responsibility for harassment by previous owners would be limited to "recent" harassment or would extend indefinitely backward in time. The Special Clinton District, with the attendant no-harassment requirement, was established in 1975. In this case, the HPD hearing officer found, in addition to finding that petitioner itself had harassed tenants, that harassment

attributable to previous owners had occurred from 1976 to 1983 (6a-7a).

HPD adopted the hearing officer's findings of harassment and denied petitioner's application for certification of no harassment (54a). Petitioner was served with the findings and with HPD's determination and then commenced this Article 78 and declaratory judgment action (9a). Special Term did not decide whether petitioner should be granted the relief sought but transferred this proceeding to the New York Supreme Court, Appellate Division, First Department, under sections 7803(4) and 7804(g) of the New York Civil Practice Law and Rules (64a) since the proceeding presented the issue of whether HPD's determination was supported by substantial evidence in the record.

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Petitioner included no additional proof in its Article 78 petition concerning the value of its building.

The New York Supreme Court, Appellate Division, First Department, confirmed, without opinion, HPD's determination, which had denied petitioner certification of no harassment (66a). Petitioner then appealed as of right to the New York Court of Appeals from the Appellate Division order; however, the appeal was dismissed sua sponte by the Court of Appeals (after the parties submitted letter briefs) upon the ground that no substantial constitutional question was directly involved (68a-71a).

Petitioner next moved in the Appellate Division, First Department for leave to appeal to the New York Court of Appeals on the grounds that section 96-109 of the Zoning Resolution was unconstitutional on its

face, that the HPD determination was obtained without procedural due process, and that the evidence was insufficient as a matter of law to sustain HPD's determination (73a). The Appellate Division denied that motion (83a).

Petitioner then moved in the New York Court of Appeals for leave to appeal to that court, and the Court of Appeals denied that motion (84a-86a; 92a).

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REASONS FOR DENYING THE WRIT

SECTION 96-109 OF THE NEW YORK CITY ZONING RESOLUTION IS NOT UNCONSTITUTIONAL ON ITS FACE, SINCE, TO PRESERVE THE SOCIO-ECONOMIC CHARACTER OF THE SPECIAL CLINTON DISTRICT IN THE FACE OF RAPID GENTRIFICATION, THE SECTION PERMITS BUILDING RENOVATIONS THAT REQUIRE AN ALTERATION PERMIT ONLY IF THE TENANTS IN THE BUILDING HAVE NOT BEEN HARASSED.

(1)

This Court should adopt the New York Court of Appeals' ruling that this case does not involve a substantial constitutional issue. In arguing that on its face section 96-109 of the New York City Zoning Resolution is an unconstitutional taking under the Fifth and Fourteenth Amendments because it permits current owners to be held responsible for the harassment of prior owners and because it prohibits improvements to petitioner's property "in perpetuity" (Petition at 12-13), petitioner ignores the basis of the agency

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determination that it challenges and two intrinsic features of zoning law. First, the HPD hearing officer found that petitioner itself had harassed tenants. No further finding was necessary for HPD to deny petitioner certification of no harassment. Thus, petitioner has no basis for arguing that it should not be held responsible for the harassment of previous owners. Second, the zoning features that petitioner ignores are that zoning restrictions run with the land and that zoning restrictions invariably impose "permanent" restrictions, at least for the foreseeable life of the zoning restriction. Neither feature renders zoning ordinances unconstitutional. See Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980). (ordinances, not limited in time, restricted development of land); Sadowsky v. City of New York, 732 F.2d 312, 318, 319 (2d Cir., 1984) (statutory certainty that subsequent

owners will be held responsible deters harassment); Pompa Construction Corp. v. City of Saratoga Springs, 706 F.2d 418, 422-23 (2d Cir., 1983) (ordinance permanently prohibited commercial use for which owners had purchased land).

A zoning ordinance that regulates the use of land is not an unconstitutional taking of private property if it substantially advances a legitimate state interest and does not deny an owner economically viable use of his land. U.S. v. Riverside Bayview Homes, Inc., ___ U.S. ___, 106 S. Ct. 455, 459 (1985), citing, Agins v. City of Tiburon, supra, 447 U.S. at 261. In Agins, this Court upheld, as advancing a legitimate state interest, the zoning restriction enacted by the City of Tiburon, California, to protect its residents from the ill effects of urbanization. The restriction limited to between one and five the number of

single-family residences that could be built on a five-acre tract of land. The landowners in Agins had bought their land before Tiburon amended its zoning requirements. Thus, although the zoning resolution permanently restricted development of the land by limiting the number of houses that could be erected, this Court found the zoning ordinance to be constitutional.

Similarly, in this case, to combat the problems of urbanization and gentrification of previously low-rent areas in New York City, article IX, Chapter 6 of the New York City Zoning Resolution was enacted to create the Special Clinton District and to permit rehabilitation of existing buildings and new construction consistent with the current existing scale of the community and "at rental levels which will not substantially alter the mixture of income groups presently residing in the area." Zon. Res. §96-00(a),

(b) (emphasis added). New York City is empowered by section 20(25) of the New York General City Law to regulate, inter alia, the location of buildings and the uses for which buildings may not be erected or altered.

Section 96-109 of the Zoning Resolution attempts to insure this goal of preserving the existing character and income mixture of Clinton and its residents by providing that the New York City Buildings Department will not issue an alteration permit for other than incidental alteration unless HPD certifies that the building owner, before evicting or otherwise terminating the tenancy of any tenant, (1) notified HPD of its intent to alter, (2) engaged in lawful relocation and eviction practices, and unless (3) HPD certifies that "no harassment has occurred." Preserving the character of a neighborhood also is a legitimate zoning purpose. N.Y.

Gen. City Law § 20(25); Marcus Associates, Inc. v. Huntington, 45 NY2d 501, 507, 382 NE2d 1323,_____, 410 NYS2d 546, 548 (1978) (preserving even the industrial character of a neighborhood is a permissible goal).

The cases cited by petitioner in support of its argument that a zoning ordinance must be limited in time (Petition at 14-18) are inapposite. In two of the cases, the municipalities had enacted temporary moratoria on certain types of development until the municipality could study completely the effect of development on the area. See Schafer v. City of New Orleans, 743 F.2d 1086, 1089, 1090 (5th Cir., 1984) (Petition at 16); Smoke Rise, Inc. v. Washington Suburban Sanitary Commission, 400 F. Supp. 1369, 1386-90 (D. Md., 1975) (Petition at 16). In Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 962 (1st Cir., 1972) (Petition at 17), a cluster zoning

restriction was upheld on the theory that it was a "stop-gap" measure until "more homework" could be done by the parties to support a permanent restriction. None of those cases involved a comprehensive zoning plan implemented after a full study as was section 96-109 of the New York City Zoning Resolution implemented in this case.

Petitioner does not even suggest that section 96-109 was implemented without an adequate study or for an illegitimate purpose. Thus, petitioner's challenge to section 96-109 rests solely on its claim that the section has rendered its property economically worthless. First, it apparently reasons that holding it responsible for a prior owner's harassment impermissibly defeated its expectations of a reasonable return on its property. Second, it claims that the permanent prohibition of a certain type of development, i.e., development that

requires an alteration permit, has rendered its property economically worthless.

(2)

Concerning petitioner's claim that section 96-109 of the Zoning Resolution impermissibly holds it responsible for a prior owner's harassment, petitioner ignores that the HPD hearing officer found that petitioner had harassed tenants in addition to finding that previous owners had harassed tenants. Thus, there is no basis for petitioner to challenge section 96-109 on the hypothetical ground that it might be held responsible for a previous owner's harassment.

In any event, the Second Circuit in Sadowsky v. City of New York, supra, 732 F.2d at 319, rejected a claim that New York City Local Law 19 was unconstitutional because it denied certification of no harassment to current owners if previous

owners had harassed tenants. New York City Local Law 19, 4 Administrative Code of the City of New York, §D26-40.06, regulated the renovation and demolition of SRO buildings. Local Law 19 was similar to section 96-109 of the Zoning Resolution in that Local Law 19 required certification that no harassment of tenants had occurred on the premises during a three-year inquiry period preceding an application to alter, renovate, or demolish an SRO. In Sadowsky, the plaintiffs had acquired title to their property in 1983, after Local Law 19 was enacted, just as petitioner in this case purchased his property in 1983, after the enactment of Section 96-109 of the New York City Zoning Resolution in 1975. While the Court of Appeals for the Second Circuit agreed that the effect of Local Law 19 might be to punish the plaintiffs for harassment they had

not committed, the Court found (732 F.2d at 319):

> [A]s a general matter the equities do not favor appellants. Under the legislative scheme implicit in [Local Law 19], statutory certainty serves as a deterrent to harassment. That is, in SRO's where harassment is found, the City will refuse to authorize renovation or demolition for three years. Further, since the certification requirement runs with the land, this certainty inhibits the prospects of selling these buildings for redevelopment purposes.... Appellants... ask the court to prevent a harm which they themselves might have prevented, had they chosen to act consistently with the legislative scheme.

Like the Sadowsky plaintiffs, petitioner purchased the building after section 96-109 was enacted and, thus, it was aware of the restrictions controlling the use of property in the Special Clinton District. Its expectations of what a reasonable return on its property would be under those restrictions could not reasonably include that petitioner could fail to provide building

security and other essential services to the current tenants while constructing around such deterioration a "top to bottom" renovation. See Sadowsky v. City of New York, supra, 732 F.2d at 317 (plaintiffs, who purchased property three weeks after regulating ordinance was enacted and three months after ordinance first received media publicity, lacked reasonable basis for expecting no obstacles to development of the property).

In this case, as in Sadowsky, supra, statutory certainty insures that harassment of tenants will not occur to thwart the purpose of maintaining Clinton as a neighborhood of mixed-income residents, one of the express goals of Article IX, chapter 6 of the Zoning Resolution. As a practical matter, the ordinance will not punish current owners for harassment occurring in the distant past since the problems of proving

that harassment occurred in the distant past will militate against a court or administrative finding that a current owner should be responsible for another's distant transgressions. In addition, the Special Clinton District was established only 12 years ago, in 1975, and harassment occurring before 1975 would not result in the denial of certification of no harassment to a current owner.

In any event, in Agins v. City of Tiburon, supra, 447 U.S. 255, this Court upheld a zoning restriction permanently restricting the development of land, and petitioner in this case could have avoided being held responsible for the prior owner's acts by not buying the property.

(3)

Nor did petitioner meet its burden of proving that it was deprived of all economically beneficial use of its property.

When it argues conclusorily that section 96-109 of the Zoning Resolution has rendered its property of no resale value because no improvements can ever be made (Petition at 4), petitioner ignores that zoning ordinances are "invested with an exceedingly strong presumption of constitutionality" and that it, as the party challenging the ordinance as an unconstitutional taking, has the burden of proving beyond a reasonable doubt that the ordinance deprived it of all reasonable use of the property. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-596 (1962); Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir., 1984), cert. den. sub. nom., 40 Eastco v. City of New York, 470 US 1087 (1985).The owner must be denied all economically viable use of its land before the Courts will find that a taking has occurred because, as this Court has said, "[E]ven if the permit [to engage

in a particular use] is denied, there may be other viable uses available to the owner." U.S. v. Riverside Bayview Homes, Inc. supra, __U.S.__, 447 U.S. at 459.

In Goldblatt v. Town of Hempstead, supra, 369 US at 592, this Court held that a zoning ordinance which prohibited a beneficial use to which the property previously had been put was not unconstitutional, and in Park Avenue Tower Associates v. City of New York, supra, 746 F.2d at 139, the Second Circuit held that deprivation of a profit is not an unconstitutional taking. Thus, a zoning classification is not confiscatory if the zoned use permits a reasonable return on the property and merely prohibits the alleged most profitable use of the property.

In this case, petitioner made no showing that it could not realize a reasonable

return on its property by making incidental repairs, which do not require the no harassment certification, or even by selling the property. Rather, petitioner simply claimed that HPD's refusal to issue certification of no harassment results in "an owner not being allowed to do anything with his property forever." Yet, petitioner's architect testified that although the alteration plans called for the creation of new apartments and, indeed, a penthouse apartment, the building was structurally sound.

Petitioner introduced no proof that its building could not be sold. Petitioner also cited its receipt of a violation for having installed a new boiler and boiler room without an alteration permit as evidence that it cannot "use" its property (Petition at 6), yet petitioner offered no testimony that it had attempted to get a permit to install a

new boiler. Rather, petitioner's architect, who admittedly had nothing to do with the heating system, offered his opinion that petitioner "couldn't get a building permit...." In short, petitioner made absolutely no showing that it has been denied a reasonable return on its property by the application of section 96-109 of the Zoning Resolution to its property.

This case is unlike Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir., 1983) (Petition at 17), in which a portion of the plaintiff's property had been "frozen" for 14 years, preparatory to being condemned for use as a highway intersection. In holding that the "freezing" was an unconstitutional deprivation, the First Circuit observed that although the municipality and the landowner had negotiated a price for the admitted expropriation of property, the municipality

had not paid. Thus, there was no question in that case that there had been a taking. In this case, petitioner submitted only its conclusions that it can do "nothing" with its property and demonstrated only that it cannot do what it had planned. As this Court held in MacDonald, Sommer & Frates v. Yolo County, ___ U.S. ___, 106 S. Ct. 2561, 2567 (1986):

> Whether the inquiry asks if a regulation has "gone too far," or whether it seeks to determine if proffered compensation is "just," no answer is possible, until a court knows what use, if any, may be made of the affected property.

Since petitioner has not demonstrated what can be done with its property, there is no basis for this Court to conclude that section 96-109 of the New York City Zoning Resolution effects a taking of petitioner's property.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

February 18, 1987

Respectfully submitted,

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